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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 CHRISTIAN COX, a married man,
12 and PACIFIC COAST FIBER
13 FUELS, LLC, a Washington limited
14 liability company, and JOSEPH A.
15 MAYO IV, a married man,

16 Plaintiff,

17 vs.

18 ALLIANT INSURANCE SERVICES,
19 INC., d/b/a MOLONEY + O'NEILL,
20 a Delaware corporation; DAN
21 ROMAIN and JANE DOE ROMAIN,
22 a marital community; FARMIN
23 ROTHROCK & PARROTT, INC., a
24 Washington corporation; and KELLY
25 EGAN and JANE DOE EGAN, a
marital community,

Defendants.

Case No.: 2:16-cv-00362-SAB

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISQUALIFY**

I. INTRODUCTION

The Motion to Disqualify brought by Alliant's local counsel, Dunn & Black, was filed as a litigation tactic intended to act as a smoke screen for their

1 own blatant violation of the Rules of Professional Conduct. A review of the
2 actual facts and law implicated by their motion confirms that there is no conflict
3 in this case and the motion was brought in bad faith as a litigation tactic.

4 Local Counsel's motion is based on a blatant misrepresentation claiming
5 that Roberts drafted the Alliant Employment Agreement, and its argument
6 ignores the fact that any representation by Roberts on behalf of Moloney,
7 O'Neill, Corkery & Jones, Inc. and Chris Cox in 2014 was adverse to Alliant
8 who is not a former client of Roberts. The particular facts and circumstances in
9 this matter establish that this motion was not brought in good faith, and the
10 "practical consequences" are such that Alliant is not a former client of Roberts
11 and Roberts has no confidential information of Alliant. Consequently, the
12 Motion should be denied and Cox should be awarded the attorney fees and costs
13 incurred as a result of responding to and arguing this motion.
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17 **II. STATEMENT OF FACTS**

18 1. Moloney, O'Neill, Corkery & Jones, Inc. ("MOCJ") is a Washington
19 corporation that was formed on September 11, 1967. **Dec. of Cox, ¶2 and Ex. A.**
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21 2. In 2013, MOCJ and Alliant Insurance Services, Inc. ("Alliant")
22 entered into negotiations for Alliant to purchase some of the assets of MOCJ. The
23 negotiations between MOCJ and Alliant were adversarial. MOCJ and Alliant
24 each retained several attorneys to represent them in the negotiations and in
25

1 drafting the documents for the transaction. **Dec. of Cox, ¶3.** Dunn, Black &
2 Roberts, PS did not represent Alliant in these adversarial negotiations and did not
3 represent Alliant at any point prior to Roberts terminating his relationship with
4 Dunn, Black & Roberts, PSC. **Dec. of Roberts, ¶2.**

5
6 3. Prior to the sale of assets to Alliant and as part of the adversarial
7 negotiations, Cox contacted attorney Kevin Roberts and Dunn & Black on or
8 about May 28, 2014 to draft a Separation Agreements for MOCJ shareholders
9 who at that time had indicated they intended to retire when the assets were sold to
10 Alliant (Gorman and O'Neill) and a general release. Cox also asked Roberts and
11 Dunn & Black to determine MOCJ's potential liability for wrongful termination
12 of MOCJ employees that Alliant did not hire if an agreement on the asset sale
13 happened. **Dec. of Cox, ¶4.** This was because Alliant had indicated that MOCJ
14 would be responsible for any such claims since this was not the purchase of a
15 business but instead was an asset purchase. **ECF 13-1, p. 10, ¶vi.**

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18 4. Cox's attorney/client communications with Roberts and Dunn &
19 Black on these matters were privileged, occurred months prior to the Alliant asset
20 sale, and were strictly for the benefit of MOCJ. MOCJ, not Alliant, paid Dunn &
21 Black's attorneys fees. **Dec. of Cox, ¶5** The separation agreements and advice on
22 MOCJ's potential liability for terminating employees when the assets were sold
23 do not relate in any way to the dispute at bar between Cox, Alliant, or any of the
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1 other Defendants in this case. Roberts never communicated with anyone at MOCJ
2 other than Cox during his brief representation. **Dec. of Cox, ¶5; Dec. of Roberts,**
3 **¶8.**

4 5. During the adversarial negotiations between Alliant and MOCJ,
5 Alliant provided drafts of the sale documents to MOCJ. These documents were
6 drafted by Alliant and/or its lawyers. **Dec of Cox, ¶6.** These documents included
7 drafts of agreements that would be exhibits to the Asset Sale Agreement. One of
8 the documents drafted by Alliant and its lawyers was a sample Employment
9 Agreement that all MOCJ shareholders would be required to sign if they wanted
10 to be employed by Alliant. Neither Kevin Roberts nor anyone at Dunn, Black &
11 Roberts, PS had anything to do with drafting the Employment Agreement being
12 proposed. Alliant had its own lawyers representing it in the Asset Purchase and
13 presumably they drafted the Alliant Employment Agreement. Both the proposed
14 Employment Agreement and Asset Purchase Agreements included provisions
15 stating that shareholders had the opportunity to have the documents reviewed by
16 independent counsel. **Dec. of Cox, ¶6 Dec. of Roberts, ¶4.**

17 6. In July or early August, 2014, Cox asked Kevin Roberts and Dunn &
18 Black if he would review the proposed Alliant Employment Agreement on behalf
19 of Cox personally to provide input on it. The Alliant Employment Agreement was
20 drafted by Alliant's attorneys, and Cox wanted an attorney to review the
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1 Employment Agreement on behalf of Cox individually to determine if he should
2 try to negotiate portions of it. **Dec. of Cox, ¶7.** This review was prior to the Asset
3 Sale being finalized and was adversarial to Alliant. In addition, it was on behalf
4 of Cox individually and for his sole benefit. **Dec. of Cox, ¶7.**

5
6 7. Cox and Roberts had been long-time friends and referral sources.
7 **ECF 27, p. 3, ¶6.** As a result, Roberts agreed to provide the legal advice without
8 charging Cox for the advice. Id. Ultimately, it was Cox's understanding that
9 Alliant would not negotiate on the terms of the Employment Agreement it was
10 proposing as a part of the Asset Sale, and the Alliant Employment Agreement
11 signed by Cox did not contain any changes discussed between Cox and Roberts.
12 **Dec. of Cox, ¶8.**

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14 8. Neither Roberts nor Dunn, Black & Roberts, PS represented Alliant
15 in any of the the above discussed matters. Their sole role was to represent MOCJ
16 and Cox on limited issues arising out of MOCJ's and Cox's adversarial
17 negotiations with Alliant. **Dec. of Cox, ¶9; Dec. of Roberts, ¶5.**

18
19 9. Cox had a written Employment Agreement with MOCJ. His
20 employment was terminated by MOCJ on or about August 30, 2014 pursuant to
21 that Agreement. Cox executed an Alliant Employment Agreement effective
22 August 31, 2014. Roberts did not draft or assist with drafting either of these
23 Employment Agreements. **Dec. of Cox, ¶10; Dec. of Roberts, ¶6.**
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1 10. The purchase by Alliant of some of the assets of MOCJ was
2 completed on August 31, 2014. However, the entity MOCJ continued to exist and
3 function as an independent, separate corporation in no way related to Alliant.
4 **Dec. of Cox, ¶11.** Because one of the assets sold was the name, the entity, MOCJ,
5 changed its name to JCOM, Inc. ("JCOM") in September, 2014. **Dec. of Cox,**
6 **¶11.**

8 11. JCOM maintained the same UBI number as MOCJ. JCOM
9 continued to maintain independent bank accounts, assets, and insurance wholly
10 independent of Alliant. **Dec. of Cox, ¶12.**

12 12. JCOM currently has a President (Dan Romain), a Vice-
13 President/Treasurer/Director (Jeffrey O'Neill), a Vice-President/Director (Mark
14 Roff), and a Secretary (Christian Cox). JCOM also had a Board of Directors and
15 four "Chairman/Directors." **Dec. of Cox, ¶14 and Exhibit A.**

17 13. JCOM continued to operate as an entity and issued payments to
18 MOCJ shareholders in 2015. JCOM issued a K-1 Statement to Cox in September
19 2016 showing that he received income from JCOM in 2015. **Dec. of Cox, ¶15.**
20 JCOM remained an active Washington corporation until December 24, 2015, and
21 although now inactive, it still has assets and liabilities. **Dec. of Cox, ¶15.**

23 14. Cox was a Shareholder, Board of Directors member, Corporate
24 Secretary, and General Counsel of MOCJ. **Dec. of Cox, ¶16.** Cox was also a
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1 member of the Executive Committee of MOCJ's Board of Directors. The
2 Executive Committee consisted of five members of the Board of Directors and
3 MOCJ President Dan Romain. This Executive Committee met weekly and
4 managed the operations of MOCJ. MOCJ's Board of Directors was authorized to
5 make all decisions for MOCJ. **Dec. of Cox, ¶16.**

7 15. The operations of Alliant's Spokane branch differ significantly from
8 MOCJ's operations prior to the asset purchase, including the following:

- 9 a. MOCJ terminated the employment of all its employees. Alliant hired
10 some, but not all, of the former MOCJ employees after the asset
11 acquisition.
12
- 13 b. MOCJ's operations were handled by a six-person Executive
14 Committee and by the Board of Directors who had ultimate authority
15 and decision making. In contrast, Alliant's Spokane branch is run by
16 two people who report to an Alliant employee in Alliant's New York
17 office. That New York employee reports to Alliant's California
18 corporate office.
19
- 20 c. MOCJ handled its accounting internally with its own accounting
21 employees. In contrast, Alliant moved the accounting operation from
22 its Spokane branch to its San Diego, California office. MOCJ
23 accounting employees were not hired by Alliant. All checks are
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1 issued by the San Diego office, and all payments are sent to the San
2 Diego office. All expense reports are submitted to Alliant's
3 California accounting office for approval and payment.

4 d. Alliant's San Diego office handles human resources matters for the
5 Spokane branch.

6 e. Alliant's corporate office handles all insurance, 401(k) retirement
7 programs, and other employee benefit programs for its Spokane
8 office.

9 f. Alliant's corporate information technology ("IT") department handles
10 all IT and phone issues for its Spokane branch.

11 g. Alliant's Spokane branch provides customer service for Alliant's New
12 York branch.

13 h. Alliant closed MOCJ's Coeur d'Alene, Idaho office.

14 i. Alliant's California office handles all licensing for its Spokane
15 branch.

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20 **Dec. of Cox, ¶17.**

21 16. Alliant informed its clients and the public of the purchase of the
22 MOCJ assets by issuing a Press Release regarding the MOCJ asset acquisition to
23 numerous news outlets, including the Spokesman-Review and the Spokane
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1 Journal of Business. This included touting that the office was now part of Alliant.

2 **Dec. of Cox, ¶18 and Exs. B and C.**

3 17. Alliant's Spokane branch operates under several trade names:
4 "moloney + o'neill An Alliant Americas Company," "Alliant Americas," and
5 "moloney + o'neill a division of Alliant Insurance Services, Inc." **Dec. of Cox,**
6 **¶21 and Exhibit D.**

8 18. Cox was an employee, Shareholder, Board of Directors member,
9 Corporate Secretary, and legal counsel of MOCJ prior to September 1, 2014.
10 After September 1, 2014, his sole position with Alliant was as an employee
11 pursuant to the Employment Agreement. **Dec. of Cox, ¶23.**

13 19. The last sentence of Paragraph 4 of the Declaration of Daniel Romain
14 is incorrect: Cox was not "legal counsel" for Alliant at any time before or after the
15 asset acquisition. **Dec. of Cox, ¶ 24.**

17 20. Cox was employed by Dunn & Black as an attorney from 2003 to
18 2006. **Dec. of Cox, ¶25.**

19 21. Kevin Roberts provided legal services to MOCJ and Cox for a short
20 period of time during the negotiations between Alliant and MOCJ on issues that
21 were directly adversarial to Alliant and which did not relate to the Employment
22 Agreement at issue. Indeed, the seperation agreements for one of the specific
23 employees referenced in the billing records were never used by MOCJ as those
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1 employees accepted employment with Alliant. Kevin Roberts has never had any
2 confidential information of Alliant, did not draft the Alliant Employment
3 Agreement, and did not represent MOCJ in actions adversarial to Cox. **Dec. of**
4 **Cox, ¶26.**

6 **III. LAW AND ARGUMENT**

7 Because of the potential for abuse, motions to disqualify opposing counsel
8 should be subjected to strict judicial scrutiny. Optyl Eyewear Fashion Intern.
9 Corp. v. Style Companies, Ltd., 760 F.2d 1045, 1050 (9th Cir. 1985) (citations
10 omitted). Because a motion to disqualify may be tactically motivated, causes delay
11 and additional expense, and disrupts attorney-client relationships, the moving party
12 must meet a high standard of proof to disqualify the movant's alleged former
13 attorney. *See Gov't of India v. Cook Ind., Inc.*, 569 F.2d 737, 739 (2d Cir.1978);
14 The District Court has the discretion to award attorneys fees and costs to the non-
15 moving party when a motion to disqualify is brought in bad faith and solely for
16 tactical reasons. Optyl, 760 F.2d at 1048.

19 **A. Alliant Is Not Roberts' Former Client and No Conflict of Interest** 20 **Exists.**

21 *A lawyer who has formerly represented a client in a*
22 *matter shall not thereafter represent another person in*
23 *the same or substantially related matter in which that*
24 *person's interests are materially adverse to the interests*
25 *of the former client....*

RPC 1.9 (emphasis added).

1 It is undisputed that Alliant is not a former client of Roberts. As such,
2 Roberts is not barred from representing Plaintiffs in this action.

3 In an attempt to justify their litigation tactic, Local Counsel makes the
4 misrepresentation to the Court that Roberts drafted the employment agreement at
5 issue. **ECF 11.** As explained above, this is patently false. Roberts briefly
6 represented MOCJ from May 28, 2014 through July 9, 2014 on specific issues
7 related to its adversarial negotiations with Alliant. **ECF 12, pgs. 16-17.** During
8 that same time, Roberts also provided Cox with individual advice on the proposed
9 Employment Agreement Alliant drafted that would apply to Cox if he accepted
10 employment following the purchase of MOCJ assets. **ECF 27, pgs. 3-4.** At no
11 time did Roberts have access to any confidential information of Alliant relative to
12 Alliant's drafting of the proposed Employment Agreement or which would in any
13 way be confidential in this litigation. **Dec. of Roberts ¶8.**

14 In addition, Alliant's argument ignores the fact that this was a partial asset
15 purchase. Alliant did not purchase or merge with MOCJ. Indeed, MOCJ
16 continued as a separate corporation for more than one year after that acquisition.
17 Roberts never performed legal services for Alliant, and MOCJ is not a party to
18 this action. Roberts never received any confidential information from Alliant and
19 Cox was Roberts' exclusive contact at MOCJ. **Dec. of Roberts, ¶7.**

1 Even if this were more than a partial asset purchase, when determining
2 whether the acquiring entity has the status of a former client, the general rule is
3 that if the successor is a different corporation it does not have the status of a
4 former client. *See e.g. citing Millar Elevator Industries, Inc. v. 421 Port*
5 *Associates, 228 A.D.2d 272, 644 N.Y.S.2d 33 (1st Dep't 1996).* A review of the
6 Sale Agreement and the record before the Court confirms that MOCJ and Alliant
7 are separate, distinct corporations. MOCJ remains a separate corporation with
8 separate assets to this day. MOCJ and Alliant have separate officers and a separate
9 Board of Directors. In fact, Plaintiff Cox is still the Corporate Secretary for
10 MOCJ. **Dec. of Cox, ¶14.** Alliant has no control whatsoever over MOCJ. Alliant,
11 a large, Delaware corporation, operates its Spokane branch substantially different
12 manner than MOCJ operated it prior to the asset acquisition. Alliant is not a
13 former client of Roberts, the brief representation by Roberts was adversarial to
14 Alliant, and the drastic measure of disqualification is not proper or warranted.
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18 The difference of the particular facts and circumstances of the cases cited
19 by Defendants and the facts at bar confirm that disqualification is not proper in
20 this case and it is being pursued in bad faith. *See Tekni-Plex, Inc. v. Meyner and*
21 *Landis, 674 N.E.2d 663 (N.Y. 1996) and USI Ins. Servs., LLC v. Ryan, 2014 WL*
22 *3054278 at 4 (N.D. Ind. July 7, 2014.) Tekni-Plex is an out of circuit case that is*
23 *easily distinguishable and does not support Local Counsel's argument that Alliant*
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1 is Roberts' former client. ECF 11. In Tekni-Plex, the acquiring successor
2 corporation "was a shell corporation created by the purchasers solely for the
3 acquisition of Tekni-Plex." Id. at 665. In contrast, Alliant Insurance Services,
4 Inc. was founded in 1925 and is one of the nation's largest insurance brokerage
5 firms. MOCJ and Alliant remained two separate, distinct entities that negotiated
6 as adversaries during Roberts' brief, limited representation of MOCJ.
7 Consequently, Tekni-Plex does not apply.
8

9 Defendants also mistakenly rely on USI Insurance Services, LLC v. Ryan,
10 an unreported opinion from Indiana that involves facts very different from the
11 issues at bar. In USI, USI based its argument to disqualify solely on two facts,
12 neither of which are present in this action:
13

14 *USI asserts that B & M should be disqualified under*
15 *Rule 1.9(a) from representing Ryan in this matter*
16 *because: (1) B & M wrote Ryan's Employment*
17 *Agreement for USI's predecessor, OAM, and (2)*
18 *represented another predecessor, Wells Fargo, in a*
19 *similar dispute against DeHayes and another departing*
20 *employee.*

21 Ryan, 2014 WL 3054278, p. 3.

22 Neither of those facts are present in this action. First, Roberts did not draft
23 an employment agreement between MOCJ and Cox. Nor did he draft the
24 employment agreement between Alliant and Cox. It was Alliant, using their own
25 counsel prior to the partial asset sale that drafted the Employment Agreement at

1 issue, not Roberts. **Dec. of Roberts, ¶6.** Likewise, Roberts never represented
2 Alliant or MOCJ in a similar dispute. In USI, the law firm at issue had
3 represented the acquired entity and its predecessors “for almost a century” on “a
4 variety of legal matters....” USI at Page 3. In this action, Roberts represented
5 MOCJ for less than two months and exclusively on issues relating to the
6 adversarial negotiations with Alliant. **Dec. of Roberts, ¶7.** The unreported
7 opinion in USI is based on entirely different facts that are not present in this action
8 and does not support Defendants’ attempt to disqualify Roberts. It is easy to see
9 the conflict in USI that does not even remotely exist in this case.
10
11

12 **B. This Litigation Is Not Substantially Related to Roberts’ Representation**
13 **of MOCJ In Its Adversarial Negotiations with Alliant.**

14 A lawyer is only barred from representing a former client “*in the same or*
15 *substantially related matter in which that person’s interests are materially*
16 *adverse to the interests of the former client....*” Matters are “*substantially*
17 *related*” if there is a substantial risk that confidential factual information gained in
18 the prior representation can be used against the former client in the subsequent
19 matter. See Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980). The current
20 litigation is not substantially related to the limited work Roberts performed for
21 MOCJ, and thus this rule does not apply. Indeed, Local Counsel fails to identify
22 any confidential information that was obtained by Roberts on behalf of Alliant
23 that could possibly be used in this action.
24
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1 During the course of its negotiations with Alliant, Cox contacted attorney
2 Roberts to draft Separation Agreements for MOCJ shareholders who intended to
3 retire from MOCJ rather than accept future employment with Alliant. **Dec. of**
4 **Cox, ¶4.** Cox also asked Roberts to determine MOCJ's potential liability for
5 wrongful termination of MOCJ employees that Alliant refused to hire if and when
6 the Alliant partial asset purchase was finalized. Neither of these assignments are
7 substantially related to the wrongful termination of Cox and Anti-Trust violations
8 that are the subject of this litigation.
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11 Matters are "substantially related" if there is a substantial risk that
12 confidential factual information gained in the prior representation can be used
13 against the former client in the subsequent matter. *See Trone v. Smith*, 621 F.2d
14 994, 999 (9th Cir. 1980). There is no substantial risk that Roberts gained
15 confidential factual information from Alliant that can be used against them in this
16 litigation. Roberts never represented Alliant, never spoke to or worked with any
17 Alliant representatives, and never received any confidential information from
18 Alliant. His services were provided solely to MOCJ months before the Alliant
19 asset acquisition. Defendants did not and cannot identify and specific confidential
20 information that Roberts allegedly gained in his representation of MOCJ, and this
21 action is therefore not substantially related to Roberts' prior representation of
22 MOCJ.
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1 Furthermore, the only confidential information obtained relative to the
2 Alliant Employment Agreement consists of Roberts communications with Cox to
3 provide Cox with personal advice on the Employment Agreement that Alliant was
4 proposing. It is illogical for Alliant to claim it should have access to the attorney
5 privileged information between Cox and Roberts or that it would be a basis to
6 prevent Cox from having the Counsel of his choice.
7

8 **C. Defendants Fail To Address the Prejudice to Plaintiffs Pacific Coast**
9 **and Mayo.**

10 Defendants' Motion seeks to disqualify Robert from the matter entirely.
11 This ignores the fact that there are other Plaintiff and Defendants whose claims
12 are not based on Cox's Employment Agreement. Even if Defendants'
13 misrepresentations were accepted, there would be no basis to deprive Pacific
14 Coast and Mayo of their Counsel.
15

16 **IV. CONCLUSION**
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18 Cox respectfully requests that the Court see this Motion for what it is, a
19 tactical smoke screen intended to distract from Local Counsel's conflict and
20 intended to advance the personal agenda of Robert Dunn. Consequently, the
21 motion should be denied and Cox awarded the fees and costs incurred.
22

23
24 /////
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1 DATED this 22nd day of November, 2016.

2 ROBERTS | FREEBOURN, PLLC

3 /s/ KEVIN W. ROBERTS

4 KEVIN W. ROBERTS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of November, 2016, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will send notification of such filings to the following:

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